

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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DAVID S. MAC FALL,  
STEPHEN B. TORTORA,  
STEPHEN J. WARD,  
MICHAEL V. YODICE,

Plaintiffs,

DECISION AND ORDER

09-CV-6113L

v.

THE CITY OF ROCHESTER,  
CHIEF DAVID T. MOORE,  
GEORGE MARKET, Executive Deputy Chief,  
DEPUTY CHIEF MICHAEL SMITH,  
SERGEANT RONALD MALLEY,  
SERGEANT JOSEPH WUKITCH,  
LIEUTENANT HERB BROWN,

Defendants.

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This action was brought by four Rochester Police Department officers against the City of Rochester and several individuals, alleging due process and other constitutional claims under 42 U.S.C. § 1983. Defendants have moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Some of plaintiffs' claims, particularly their due process claims, relate to the timing and conduct of an administrative hearing on disciplinary charges that have been brought against the plaintiffs. Plaintiffs have taken the position in this litigation that the disciplinary proceedings have,

in effect, dragged on for too long, and that the timing of the hearing has been manipulated or controlled by defendants and their counsel. Defendants have suggested that plaintiffs (who are represented by different counsel in the disciplinary proceedings) have consented to, or at least have not objected to, the hearing schedule. In a letter to the Court dated June 29, 2010, counsel for defendants has also apprised the Court that some testimony has been taken in that hearing, that further testimony is scheduled for July 30 and August 9, 2010, and that the hearing may conclude as early as August 9.

Although these matters are clearly relevant to plaintiffs' claims in this action, they are not set forth in the complaint, and cannot be resolved solely by reference to the pleadings. Accordingly, the Court hereby gives the parties notice of its intention to convert defendants' motion to dismiss under Rule 12(b)(6) to a motion for summary judgment under Rule 56, as set forth in the Conclusion of this Decision and Order.

## **CONCLUSION**

Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, the Court hereby gives the parties notice of its intention to convert defendants' motion to dismiss (Dkt. #4) to a motion for summary judgment under Rule 56. Plaintiff and defendants shall submit, no later than **July 26, 2010**, any additional materials pertinent to defendants' motion, in accordance with Rule 56(e) of the Federal Rules of Civil Procedure and Rule 56.1 of the Local Rules of Civil Procedure for this district. Those submissions need not be limited to plaintiffs' due process claims, but may address

any issues raised by defendants' motion. Any additional memorandums of law shall not exceed fifteen (15) pages in length, unless otherwise ordered by the Court upon good cause shown.

IT IS SO ORDERED.



DAVID G. LARIMER  
United States District Judge

Dated: Rochester, New York  
July 6, 2010.